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Kuhlke

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re @radical.media, Inc.

Serial No. 78217142

Edward H. Rosenthal of Frankfurt Kurnit Klein & Selz, PC
for @radical.media, Inc.

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Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

Before Bucher, Drost and Kuhlke, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

@radical.media, Inc. has filed an application to
register THE AD NETWORK (standard character form) on the
Principal Register for "cable and satellite television
broadcasting services" in International Class 38.¹

¹ Application Serial No. 78217142, filed February 26, 2003, alleging a bona fide intent to use the mark in commerce. On March 20, 2003 applicant filed a preliminary amendment which appears to request a change in the applicant, i.e., from @radical.media, Inc., a New York corporation, to The Ad Network LLC, a Delaware corporation. The examining attorney did not take any action with regard to this amendment and applicant continues to refer to itself as @radical.media, Inc. See generally, TMEP

The examining attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark is merely descriptive of its services. In addition, the examining attorney required applicant to indicate if the term "AD" has any significance in the relevant trade or industry as applied to the services. Applicant responded that the proposed mark "does not immediately convey the nature of Applicant's services." Further, applicant argued that "[w]hile the term 'ad' is an abbreviation for the term 'advertisement,' it does not automatically follow that it describes Applicant's services." Applicant then confirmed that "[o]ther than the fact that 'AD' is an abbreviation of the term 'advertisement,'...the wording has no other significance in the relevant trade or industry."

When the refusal was made final, applicant appealed. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

The examining attorney contends the applicant "is providing a network of programming featuring advertisements or as the applicant refers to it - 'information on products and services available locally to viewers.'" (Brief, p. 4)

§§ 501.01(a) and 803.06. We note no change of name or assignment has been filed with the Office.

She concludes that "in order to be held descriptive the mark does not have to describe the subject matter of the ads the applicant broadcasts...[i]t is enough to tell the consumer that a feature or the purpose of the network's services is to broadcast ads." (Brief, p. 4) We take judicial notice of the definition of "advertisement" presented in the examining attorney's brief as set forth below:²

Advertisement: a notice, such as a poster, newspaper display, or paid announcement in the electronic media, designed to attract public attention or patronage. The American Heritage Dictionary of the English Language (3rd ed. 1992).

We also take judicial notice of the following definition of the term NETWORK:

Network: 3.a A chain of radio or television broadcasting stations linked by wire or microwave relay. b. A company that produces the programs for these stations. The American Heritage Dictionary of the English Language, (4th ed. 2000)

In arguing that its proposed mark is not descriptive applicant states that its "channel will provide content and programming grouped into different consumer interest categories, as well as information on products and services available locally to viewers in those categories..."

² University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (Board may take judicial notice of dictionary definitions).

[V]iewers interested in the latest SUVs will be able to choose and watch packaged car programming consisting of commercials as well as augmented information (such as where the consumer can find the product locally)." Further, applicant argues that "[w]hile advertisements may be included in the programming, the actual subject matter(s) of the programming is not advertising...Thus, applicant's mark does not provide any real information about the subject matter of applicant's services."³

"A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities, ingredients or characteristics of' the goods or services related to the mark." In re Oppendahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), quoting, Estate of P.D. Beckwith, Inc. v. Commissioner, 252 U.S. 538, 543 (1920). See also In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). The test for

³ In addition, applicant submitted a print-out from the Trademark Electronic Search System (TESS) of a third-party registration for the mark HOME BOX OFFICE, noting that it registered without a Section 2(f) claim. Third-party registrations are not probative inasmuch as prior decisions of other examining attorneys are not binding upon the Office and the Board must decide each case on its own facts and record. In re International Taste Inc., 53 USPQ2d 1604 (TTAB 2000); In re Consolidated Foods Corp., 200 USPQ 477 (TTAB 1978). The second TESS print-out of another third-party registration attached to its appeal brief is untimely. Trademark Rule 2.142(d); In re Posthuma, 45 USPQ2d 2011, 2012 n. 2 (TTAB 1998).

determining whether a mark is merely descriptive is whether it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986); In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant quality, feature, etc. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). In re Venutire Lending Associates, 226 USPQ 285 (TTAB 1985). Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. In re Abcor Dev. Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

In this case, we are persuaded that the phrase THE AD NETWORK when used in connection with cable and broadcasting services would immediately inform the potential users of those services that the programs involve, in applicant's

words, "information on products and services...consisting of commercials...." We are not persuaded otherwise by applicant's argument that because the programming is not *about* advertising but rather *is* advertising, the proposed mark is not descriptive.

When applied to applicant's services, the phrase THE AD NETWORK immediately describes, without conjecture or speculation, a significant feature or function of applicant's services, namely the provision of advertisements broadcast over a network. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for prospective users of applicant's services to perceive readily the merely descriptive significance of the term THE AD NETWORK as it pertains to applicant's services.

Decision: The refusal to register is affirmed.